Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

LOREN R. SMITH,

Petitioner,

V.

BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM, ET AL,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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75 pp

QUESTIONS PRESENTED

1. Whether a one-year durational residency requirement to be eligible for reclassification to pay the resident rate for university tuition, augmented by a refusal to count time spent in state as a full-time university student towards this requirement, violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment of the United States Constitution.

2. Whether a one-year durational residency requirement to be eligible for reclassification to pay the resident rate for university tuition, augmented by a refusal to count time spent in state for the predominant purpose of attending a university towards this requirement, violates the Equal Protection or Due Process Clauses of the Fourteenth

Amendment of the United States Constitution.

3. Whether a one-year durational residency requirement to be eligible for reclassification to pay the resident rate for university tuition, augmented by a requirement that the student be employed full-time during that year, violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment of the United States Constitution.

4. Whether a one-year domiciliary requirement to be eligible for reclassification to pay the resident rate for university tuition, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

5. Whether a one-year durational residency requirement to be eligible for

reclassification to pay the resident rate for university tuition, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

6. Whether charging different university tuition rates based upon a student's classification as a resident or nonresident violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

LIST OF PARTIES

Loren R. Smith - Petitioner, pro se.

Board of Regents of the University of Houston System - Respondent.

Mario C. Lucchesi, in his official capacity - Respondent.

Patricia M. Cavanaugh, in her official capacity - Respondent.

Janice S. Moss, Assistant Attorney General of the State of Texas - counsel for Respondents.

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Petitioner, LOREN R. SMITH ("Petitioner" or "Smith) respectfully requests that this Court grant this petition for writ of certiorari, seeking

review of the judgment of the Court of Appeals for the First District of Texas in favor of respondents, BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM; MARIO C. LUCCHESI, IN HIS OFFICIAL CAPACITY; and PATRICIA M. CAVANAUGH, IN HER OFFICIAL CAPACITY (collectively referred to as "Respondents"). Petitioner was the plaintiff in the Trial Court and the appellant in the Court of Appeals; respondents were the defendants in the Trial Court and the appellees in the Court of Appeals. The opinion from the Court of Appeals is published at 874 S.W.2d 706 (Tex.App.--Houston[1st Dist] 1994, writ denied).

STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal under 12 U.S.C. § 1257 (a) and 42 U.S.C. § 1983. Petitioner argues herein

that this Court should grant certiorari pursuant to Supreme Court Rule 10(b), as a case wherein a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort, and pursuant to Supreme Court Rule 10(c), as a case wherein a state court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. The decision below upheld the challenged constitutionality of Tex.Admin.Code § 21.23 of Tex.Educ.Code § 54.054. The decision below did not reach the challenged constitutionality of

Tex.Educ.Code § 54.052(f).[1] The Respondents raised defenses of sovereign immunity and governmental immunity, which were expressly not reviewed by the Court of Appeals. Should this Court grant certiorari and reverse the holding of the Court of Appeals on the questions of constitutional law, it would be necessary to remand the case to the Court of Appeals for review on the points on sovereign and governmental immunity, and Petitioner's request for declaratory and mandamus relief.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. United States Constitution, Fourteenth Amendment, Section 1:

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[1]The Court of Appeals incorrectly noted that "the constitutionality of the first statute listed above [Tex.Educ.Code Ann. § 54.052(f)(Vernon 1987)] is not an issue in this case" and that "Smith does not challenge his initial classification as a nonresident". Petitioner challenged this statute in Points of Error Five, Six and Seven. Appendix "E".

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Texas Educ. Code Ann. § 54.052(f) (Vernon 1987):

(f) An individual who is 18 years of age or over who resides out of state or who has come from outside Texas and who registers in an educational institution before having resided in Texas for a 12-

month period shall be classified as a non-resident student.

3. Texas Educ. Code Ann. § 54.054 (Vernon 1987):

A nonresident student classification is presumed to be correct as long as the residence of the individual in the state is primarily for the purpose of attending an educational institution. After residing in Texas for at least twelve (12) months, a nonresident may be reclassified as a resident student as provided in the rules and regulations adopted by the Coordinating Board, Texas College and University System. Any individual reclassified as a resident student is entitled to pay the tuition fee for a resident of Texas at any subsequent registration as long as he continues to maintain his legal residence in Texas.

4. Texas Admin. Code § 21.23 (West 1993-94) (See Appendix "M").

STATEMENT OF THE CASE

A. Factual Background

Petitioner filed suit against Respondents based on their refusal to reclassify him as a resident for tuition purposes after each of his five applications throughout the last two and one-half years of the three and one-half years he attended law school.[2] Specifically, Petitioner sought a writ of mandamus and declaratory judgments that he was been entitled to the classification of "resident" since August 1987, that he was

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[2]Petitioner sought mandamus relief upon Respondents Mario C. Lucchesi, the University's Registrar, and Patricia M. Cavanaugh, the Associate Registrar, who are responsible for the initial review of each application, and whose administrative decisions are reviewed by a three person Appeals Committee. The University of Houston and Lucchesi were similarly defendants in *Byrnes v. University of Houston*, 507 S.W.2d 815 (Tex. Civ. App.-Houston[14th Dist.] 1974, writ ref'd n.r.e.).

entitled to a refund of excess tuition paid, and that the policy that resulted in the denial of Plaintiff's requests for reclassification violates the Equal Protection Clause and Due Process Clauses of the Fourteen Amendment of the U.S. Constitution.

At the time of commencement of this case, Petitioner was a law student at the University of Houston ("the University"). Petitioner subsequently graduated on December 15, 1990. Petitioner was born in Indianapolis, Indiana, on May 7, 1963. Petitioner received a Bachelor of Science degree from Indiana University in August 1985. Petitioner then moved to Stow, Ohio to work full-time for two years as a systems analyst. Petitioner applied to and was accepted to law schools in Texas and California. Petitioner chose to

attend school at the University of Houston Law Center, beginning August 1987. Petitioner resigned from his position in Ohio in early August 1987, moved to Houston a week later, and began his legal studies later that month.

In August of 1988, after having attended the University of Houston for one year, Petitioner applied with the University to be reclassified as a resident for tuition purposes. This request was denied. Petitioner filed applications renewing his request for reclassification each of the following semesters, namely Spring 1989, Fall 1989, and Spring 1990, and Fall 1990. Petitioner was denied reclassification each of these semesters. As stipulated by the parties at trial, Petitioner was "refused reclassification after each of

his five applications either because he was not in Texas for the prior 12 months before his enrollment in the University, and he was therefore deemed to have come to Texas 'to go to school', and/or he had not been employed full-time in the state for an entire year while enrolled in school at less than part-time status." After the Fall 1990 refusal, while still a student, Petitioner filed this lawsuit.

Petitioner's domiciliary intent was unquestioned at trial. In the review process, Petitioner submitted so much information to the University in his five successive applications for reclassification, that Respondents not only admitted at trial that they had no doubt *at the time of their review* that Petitioner had "bona fide" domiciliary intent, they went so far as to stipulate

that Petitioner had, even prior to his first application, the intent to remain in Texas after graduation, with the intent to "find gainful employment in Houston upon graduation." Appendix "A".

The trial testimony of University of Houston Law Center Professor Michael A. Olivas ("Prof. Olivas") demonstrated the University had no doubts as to the "bona fides" of Petitioner's intent at the time of their review. Prof. Olivas testified not only as an expert (through his extensive writings on education law and policy), but as a fact witness with knowledge as to the actual reasons Petitioner's applications were denied, as he sat on the University appeals committee that reviewed Petitioner's appeal of his administrative denial (the highest and final level of review). First, Prof.

Olivas admitted Petitioner gave more than enough information to the University during the review process to ascertain his domiciliary intent:

> A. By the way, I do not impute dishonesty to you. I don't believe that you were dishonest.
>
> Q. Okay. And you're not saying when you look over my applications that I didn't submit enough information. I gave more -- enough information for y'all to make a reasoned approach as to my status?
>
> A. I don't even know what other information you could have given us. I certainly think we had enough information.

In particular, as of Petitioner's fifth application in Fall 1990, Petitioner documented that he had been continuously, year round, in the state for three years. From August 1987, Petitioner continuously leased apartments in Texas, year round. As of the date of his first application for reclassification, Petitioner possessed

a Texas Driver's license, a Texas Vehicle Registration and Texas Voter Registration Certificate. Petitioner had been continuously employed in Texas (either part-time or full-time) since March 1988. On March 15, 1988, during the first year of law school, Petitioner began a position as a law clerk with the Houston firm of Hughes, Watters & Askanase. Petitioner has worked there ever since, presently as an associate attorney of the firm. Prof. Olivas admitted that Petitioner "was as good as his word" on his stated domiciliary intentions, and "certainly ended up doing what he said he would do. . . ."

Petitioner took longer than the standard three years for a law student to graduate, as he dropped down to part-time status his final two semesters (Spring and

Fall 1990) due to financial difficulties. Prior to his fifth application, he had not physically stepped foot outside of Texas for three years. One official, who denied Petitioner's first application for reclassification, noted that she did not know of any students who had applied for reclassification as many times as Petitioner.

Petitioner's employer wrote letters to the University on multiple occasions to document Petitioner's employment in support of Petitioner's applications for reclassification. In one such letter, Petitioner's employer noted that during the Summer of 1989, Petitioner worked at the same firm as a "Summer Associate", which is a full-time position where the individual's potential for post-graduate employment as an associate with the firm

is evaluated.

Finally, beginning in January 1990, when Petitioner dropped to part-time status, he increased the hours he worked per week to 28 to 30 hours per week, a fact noted by his employer to the University. However, nothing short of full-time employment, defined by the University as 40 hours per week, coupled with part-time enrollment, would have qualified Petitioner for reclassification under the University's interpretation of the regulation.

> Q. So on my fourth application when I have nine hours and on my fifth application when I'm taking six hours, you could have considered me a part-time student?
>
> A. No. Considered you a part-time student?
>
> Q. Yes.
>
> A. I believe that we could have.

Q. Okay. But I would have needed to work full-time and that being 40 hours or more?

A. 40 hours during those semesters.

Q. During those semesters.

A. Yes.

Q. 28 to 30 hours is not enough?

A. No.

Prof. Olivas noted that even if the student worked full-time, the student would not be eligible for reclassification if enrolled in school full-time. "In fact, I will say that full-time for us means that you're not in school full-time".

As to the University's assessment of the Petitioner's domiciliary intent, Prof. Olivas testified:

Q. Okay. Do you think it's pos -- I noticed throughout that you said from my documents it was

apparent that I came here to go to school. Do you think it's possible that someone can pick up and go to another state and start school and be a full-time student there and have a domiciliary intent to make that their home?

A. Sure. I don't doubt that you did that. Again, I don't -- I don't question --

Q. But again --

A. I don't question your bona fideness.

When questioned at trial that the different wording Petitioner used in his later applications (the matter of fact statement by Petitioner in his Spring (fourth) and Fall (fifth) 1990 applications where he declared that he came to Texas "to reside",[3] may have been the result of cynicism because of the denial of Petitioner's prior appeals,

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[3]specifically noted in the Court of Appeal's opinion, 874 S.W.2d at 707.

Prof. Olivas remarked:

A. Well, I guess you're entitled to cynicism by that time. It more conformed to the legal language, but it didn't change the fact that your original reason for coming here by your own concession was to go to school. That's what we were determining at that time. I didn't mean to suggest that by the time we had gotten the fourth and fifth one that we didn't believe that you were coming here to reside. I believed it from the first three.

Q. Okay.

A. That was never a question.

. . . .

Q. But at least from the evidence that I gave in 1988 for my third and fourth application, there was no -- there's no doubt in you mind -- you didn't have any doubt that my intent was to be a Texan or to be domiciled in the state?

A. I had no reason to doubt that.

Q. Okay. So is there some kind of problem in the domiciliary requirement that it didn't catch the fact that my true intent was a domiciliary but at least the requirement didn't allow me to be

reclassified to meet my true intent?

A. Well, I would prefer, as I've indicated in virtually all of my writings, that it be a determination based on duration. I think that that would simplify this, but I don't think that it's improper. I think the state's entitled to do that. I mean, the state in my reading of the rights of states and benefits and according in this area, unless it's an absolute bar like Connecticut had in the Vlandis case where if you applied from outside the state you were forever barred with no appeal available. That was a clear irrebuttable presumption. It was struck down, in my view properly, by the court. I don't think that we have that system. What we do is weigh these and sniff them and look them over (indicating) and take people at their word; and on that whole record, you didn't provide the one piece that you needed, which would have been full-time employment, probably coupled with part-time enrollment; because I know that there's some ABA rules,[4] but I would say the same would have been true for

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[4]The ABA states that first-year law students should not work at all, and second or third year students should work no more than 20 hours per week. With the University requirement that Petitioner work 40 hours per week to be eligible for reclassification, Petitioner could not qualify without violating the ABA directive.

an undergraduate student. It didn't make a difference that you were a law student for that purpose.

Q. Okay. But in your mind, I was a domiciliary of the state?

A. For every other purpose other than residence.

Q. But this residence purpose bound you to make the decision that you did?

A. Oh, I felt that we were under an obligation to apply the statutes and the regulations which speak to that.

Texas requires a student originally classified as a nonresident to wait at least twelve months after arriving in Texas prior to applying for reclassification. However, this twelve month durational residency requirement is augmented by the refusal to count time spent in state for the primary purpose of attending a university towards the waiting period. Tex.Educ.Code Ann. § 54.054

(Vernon 1987). This augmentation can be directly seen in Respondents' admission in their interrogatory answer (admitted at trial) as to why they refused to reclassify Petitioner:

> **ANSWER:** Plaintiff came to Texas to attend the University of Houston Law Center and enrolled prior to establishing residency for tuition purposes. Evidence submitted by plaintiff to justify reclassification included a letter that he had lived here continuously since 1987, was working 20-30 hours per week at a law firm, and intended to take the Texas bar examination. This was not sufficient to overcome the original classification. Employment and enrollment were weighted in light of the fact that residence in Texas while in school is primarily for purposes of education, not to establish residence. Decisions of an individual as to residence are typically made after completion of education and not before.

The last two sentences of this answer are a quote from the applicable regulation from the Texas Administrative Code.

Texas universities do reclassify a

small number of students who apply for reclassification. These are students who a university deems to not be in Texas "primarily for the purpose of education." The applicable regulation from the Administrative Code specifically enumerates facts that will allow reclassification. To qualify, a student (or in some instances, his/her spouse) must either be employed full-time for one-year (while being enrolled less than part-time), purchase a homestead with a substantial down payment, or be the dependent (for income-tax purposes) of a parent or court-appointed legal guardian who is a Texas resident for at least one year prior to enrollment.[5] As admitted by

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[5]The University of Houston, being located in large metropolis, in all likelihood reclassifies a much greater number of students than universities in small towns, such as Texas A & M. The University of Houston draws more part-time students, who work full-

Prof. Olivas, these specifically enumerated "facts or actions [that are] unequivocally indicative of a fixed intention to reside permanently in the state" from the regulation are the *exclusive* showing that would entitle a student to reclassification.

> Q. Okay. Well, because of the rules, I may have all these facts out here that show that my domiciliary intent is in Texas; but I really can't prove to the committee and get reclassified as a domiciliary because I haven't satisfied the certain statutory requirements that are there?

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time and attend school part-time, often in the evening. The policy allows for reclassification of students in Texas for the "secondary purpose" of attending school; i.e, they came here for a full-time job, or to marry a Texas resident. Of the sampling of twenty students approved for reclassification whose applications were introduced by Respondents at trial, seven appeared to have "stopped out", i.e., withdrew from school for a year, ten appear to have worked full-time for a year, and three appeared to have married Texas residents who worked full-time in Texas for a year. Tex.Educ.Code § 54.056 was modified in 1985 to delete the automatic qualification for married students. The University did not submit applications of any students who qualified by "purchasing a homestead with a substantial down payment" (an impracticable requirement for most students).

A. I'd say that's it in a nutshell. We didn't -- we don't feel we have the authority to go beyond the statute in that regard.

. . . .

A. Well, by this time we had three [of Appellant's five applications] of these; and you'd not given us anything that was germane to reconsideration. You weren't working full-time. You hadn't dropped to part-time; nothing else had materially changed; and so I think it was an attempt to signal to you that unless you come up with something else that's grounded in the statute or the regulation, that we'll continue to deny it; because it's just essentially the same appeal.

Q. So nothing else is going to be -- at least at this point nothing else is going to be considered or at least be considered new evidence unless it's the fact of me dropping down to part-time, working full-time; or dropping out of school for a whole year?

A. I thought I had said that, yes.

It is impossible for full-time students seeking reclassification "based on self", i.e., not seeking to be reclassified based

upon someone else's status (spouse, parents), to be reclassified for the entirety of their college carriers so long as they remain full-time status. A student in Texas has to essentially forgo a whole year of education by either withdrawing for an entire year and reapplying for admission, or by dropping down to part-time student status while working full-time. It is this requirement of part-time enrollment coupled with gainful full-time employment, and the corresponding refusal to count time spent in state for the primary purpose of attending a university towards the one-year waiting period, that Petitioner is challenging as unconstitutional under the minimum, intermediate or strict levels of scrutiny of the Equal Protection Clause, under the Due Process Clause as an

impermissible irrebuttable presumption, and under the Due Process Clause as arbitrary and capricious.

B. Procedural History

This appeal is from the 125th Judicial District Court of Harris County, Texas, Cause No. 90-64282, Honorable Judge Don G. Humble presiding. Among other causes of action, in each of Petitioner's petitions filed with the Trial Court, Petitioner alleged that the policy violated Petitioner's rights under the Equal Protection Clause and Due Process Clause of the United States Constitution, and violated his federal constitutional rights under color of state law, invoking the court's concurrent jurisdiction under 42 U.S.C. § 1983. The case was tried to the Court (bench trial) on July 23 and 24, 1992, after which the Court took the case

under advisement. The Court signed a take-nothing judgment in favor of Respondents on October 13, 1992, rejecting each of Petitioner's causes of action, including the federal questions presented in this Petition (Appendix "D"). The federal questions presented and denied in the Trial Court and the Court of Appeals, and presented but not reviewed (writ denied) in the Texas Supreme Court, are listed in Appendix "E". In an opinion published at 874 S.W.2d 706, the First Court of Appeals, Houston, affirmed the Trial Court judgment, in cause no. 01-93-00108-CV (Appendix "F" and "G"). The Court of Appeals overruled Petitioner's Motion for Rehearing on April 28, 1994 (Appendix "H"). The Supreme Court of Texas denied Petitioner's Application for Writ of Error on October 6, 1994, with the

notation "Writ Denied" (Appendix "I"), and overruled Petitioner's Motion for Rehearing on November 22, 1994 (Appendix "J").

REASONS FOR GRANTING THE WRIT

I. Overview.

The stakes for students in the residency classification process are high. Texas charges undergraduate nonresidents a rate ten times higher than its residents. M. Olivas, *Administering Intentions*, 59 Jour. of Higher Education, No. 3, p. 263. At the graduate level, where students pay a premium rate, the Petitioner paid nonresident tuition totaling $14,520.00 over the entirety of law school. Had Petitioner been classified as a resident, he would have paid $6228.00. The spiraling cost of higher education and modern day mobility has increased these

stakes in recent years. With the ever-increasing stakes, the issues of this case will have important consequences on the tuition determination process for thousands of students each year.

The increasing stakes has yielded a sharp increase in litigation by disenchanted students in the past thirty years. However, the only guidance given by this Court on the constitutionality of university resident tuition requirements was the 1973 case of *Vlandis v. Kline*, 412 U.S. 441 (1973). In *Vlandis*, this Court struck down under the Due Process Clause a Connecticut statute that irrebuttably presumed that a student's residency status as established at the time of his application for admission would remain the same throughout the entirety of his admission at the university. *Vlandis*, 412

U.S. at 443. This Court stated its holding did not mean that under the Due Process Clause a State could not impose a bona fide residency requirement that could be met "while in student status". The Court's direction that a bona fide residency requirement should be able to be met while in student status has since been ignored by many states, including Texas, which have rewritten their statutes to cloak their review process as having a rebuttable presumption, but making reclassification nearly as difficult to obtain as the scheme struck down in Vlandis. The opinion of the Court of Appeals erodes *Vlandis* to the point that "in student status" only means "in part-time student status".

This case presents the Court with a wide range of issues that would allow the

Court to issue an "end-all" opinion on the matters of resident/nonresident tuition and reclassification. The record contains extensive expert testimony that would allow the Court to fully weigh the public policy issues involved in the resident/nonresident classification dispute. The case involved no factual disputes (the facts were stipulated, as was the admissibility of each party's exhibits - Appendix "A" and "B"), making a uncluttered record devoted to questions of law and public policy. The appeal raises the question of which of the two or three possible levels of scrutiny under the equal protection clause (minimum, intermediate, or strict) is applicable in evaluating the constitutionality of resident tuition regulations at issue. Finally, the questions presented range the

gamut of possible relief in evaluating the constitutionality of residency classification schemes. If the Court determines the minimum standard of review applies, the Court could reaffirm the holding of *Vlandis* and hold that time spent while a full-time student should not be excluded from a bona fide residency requirement. Should the Court agree that the statutes in question deter significant numbers of students from moving to another state to attend a university, and create a barrier to competition among the universities for the brightest students, the implication of the fundamental right to travel would call the validity of the entire process into question.

II. Standard of Review under Minimum Scrutiny - Valid Test of "Bona Fide" Residency.

This Court in *Vlandis* did not review

the Connecticut statute under the Equal Protection Clause, but under the Due Process Clause of the Fourteenth Amendment. The Court held that a durational residence requirement should be a test of "bona fide" residency:

> Our holding today should in no wise be taken to mean that Connecticut must classify the students in its university system as residents, for purposes of tuition and fees, just because they go there. Nor should our decision be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residence requirement, which can be met while in student status.*9

Vlandis, 412 U.S. at 452. The majority then distinguished the one-year durational residency requirement of *Starns v. Malkerson*, 326 F.Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971):

> *9 Minnesota's one-year durational residency requirement, however, differed in an important respect from

> the permanent irrebuttable presumption at issue in the present case. Under the regulation involved in Starns, a student who applied to the University from out of State could rebut the presumption of nonresidency, after having lived in the State for one year, by presenting sufficient other evidence to show bona fide domicile within Minnesota. In other words, residence within the State for one year, whether or not in student status, was merely one element which Minnesota required to demonstrate bona fide domicile. By contrast, the Connecticut statute prevents a student who applied to the University from out of State, or within a year of living out of State, from ever rebutting the presumption of nonresidence during the entire time that he remains a student, no matter how long he has been a bona fide resident of the State for other purposes. Under Minnesota's durational residency requirement, a student could qualify for in-state rates by living within the State for a year in student status; whereas under Connecticut's scheme, a person who applied from out of State can never so qualify so long as he remains in student status.

Vlandis, 412 U.S. at 452, fn.9. Central to this Court's consideration was that a "bona fide" residency requirement be able

to be met while "in student status". This Court then provided guidance as to what it viewed to be a reasonable residence requirement, quoting an attorney general's opinion:

> "In reviewing a claim of in-state status, the issue becomes essentially one of domicile. In general, the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he had the intention of returning. This general statement, however, is difficult of application. Each individual case must be decided on its own particular facts. In reviewing a claim, relevant criteria include year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, *vacation employment, etc.*"

Vlandis, 412 U.S. at 454 (emphasis added). The Texas regulation specifically states that the above criteria are *not* enough to justify reclassification:

> Reclassification to resident status

> after residing in the state for 12 months cannot be based solely upon the student's or the student's spouse's employment, registration to vote, registration of a motor vehicle and payment of personal property taxes thereon, or the securing of a Texas driver's license."

Texas Admin. Code § 21.23 (West 1993-94).

In *Zobel v. Williams*, 457 U.S. 55 (1982), this Court reaffirmed the holding of *Vlandis* that a durational residency requirement must be a valid test of bona fide residence. The Court went on to undercut the predominant argument that has been propounded in support of distinguishing between residents and nonresidents, that the distinction rewards the prior tax contributions of its citizens. In doing so, this Court expressly questioned the analysis of *Starns*. *Zobel*, 457 U.S. at 64, fn.13. In *Starns*, the district court in *Starns*

upheld the "primary justification" propounded by the state that tuition residence requirements facilitate a return of prior contributions "through employment, tax payments and expenditures therein." *Starns*, 326 F.2d at 240. This Court in *Zobel* held that this is not a legitimate state interest. *Zobel*, 457 U.S. at 63.

One commentator notes that several states require one-year of residence in the state for reclassification, and then "enhance this restriction by refusing to count towards the specified waiting period time spent in the state for the predominant purpose of attending a university." T. Parent, *Tuition Residence Requirements: A Second Look in Light of Zobel and Martinez*, 61 Ind. Law Jour. 287, 289 (1986). The commentator, in arguing

the unconstitutionality of this provision, notes the irrationality of such a requirement.

> The analysis of *Zobel* and *Martinez* suggests that one typical requirement lying in this zone of uncertainty may now be especially vulnerable as more than a test of bona fide residence. These tuition residence requirements contain two distinct provisions. First, they impose a waiting period, for example, one year. Second, they specify that physical presence in the state *for the predominant purpose of attending a college or university* or other institution of higher education shall not be counted towards the specified waiting period.
>
> . . .
>
> If, however, the distinction between durational and bona fide residence requirements is to have any meaning at all in this area, a requirement which refuses to count physical presence for the predominant purpose of attending a university towards a specified waiting period must almost certainly be unconstitutional in light of *Zobel* and *Martinez*. Such a requirement does far more than act as a test of bona fide residence. In fact, such a requirement is so overinclusive as to effectively preclude *all* bona fide residents who

> applied from out of state from *ever* being considered bona fide residents during their academic careers, because the students' predominant purpose for being in the state, even if they are bona fide residents, is to attend a university. Such a requirement thus has the same effect as the irrebuttable presumption held unconstitutional in *Vlandis*. If an individual's primary purpose for being in a state is to obtain an education, such a requirement renders the person a nonresident for tuition purposes regardless of her actual domicile. The argument that such a residence requirement is unconstitutional is further bolstered by the Court's statement in *Vlandis* that its decision should not "be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met *while in student status*." The Court in *Vlandis* thus recognized the grave injustice that can be worked by prohibiting all out-of-state students from ever acquiring in-state status "while in student status."

T. Parent, at 312-14 (emphasis original).

Petitioner admitted at all times that he came to Texas "to go to school". Petitioner started law school as a "full-

time student"; "student" was his primary occupation. However, Petitioner did not come to Texas *solely* to attend school, and then leave the state.[6] Petitioner came to Texas to live, "with the hope that he would find gainful employment in Houston upon graduation." Appendix "A" Petitioner specifically selected a law school in a state (and city) where he wished to live and work after graduation.

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[6]The fact that the Petitioner applied to school from out of state was central to the Appellees' review. This, however, was obviously not a factor that impressed the Supreme Court:

> [B]asing the bona fides of residency solely on where a student lived when he applied for admission to the University is using a criterion wholly unrelated to that objective. As is evident from the situation of the appellees, a student may be a bona fide resident of Connecticut even though he applied to the University from out of State. Thus, Connecticut's conclusive presumption of nonresidence, instead of ensuring that only its bona fide residents receive their full subsidy, ensures that certain of its bona fide residents, such as the appellees, do *not* receive their full subsidy, and can never do so while they remain students.

Vlandis, 412 U.S. at 448-49.

This evidence was ignored by Respondents because Petitioner had been not been gainfully employed (full-time) for a year in Texas, and therefore was deemed to have come to Texas "to go to school."

The Texas regulation presumes students are untruthful regarding their intentions. It is important, however, to distinguish the students intentions - their present intentions, and their intentions upon graduation. Under the domicile test, the individual's present intention is the applicable question, not the individual's intention four years from now.[7] In reality, the student's intention upon graduation is illusory, as many students do not have a good idea what

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[7]Prof. Olivas cited at trial University statistics that over ninety percent of University of Houston law school graduates remain in Texas after graduation, with over seventy percent remaining in the City of Houston.

their major course of study will be the next year, let alone where they will live in four years.[8]

III. In Addition to Conflicting with the Thrust of *Vlandis*, the Opinion of the Court of Appeals Conflicts with the Opinions of other Lower Courts.

Other Courts have issued opinions that conflict with the holding of the Court below that a state may refuse to count time spent as a full-time student towards the one-year waiting period. In *Weaver v. Kelton*, 357 F.Supp. 1106 (E.D. Tex. 1973), a student who was reclassified after a one-year waiting period, was challenging the constitutionality of the Texas statute requiring the one-year

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[8]The Sixth Circuit has struck down an analogous Ohio requirement that students submit proof that they will be employed in the state after graduation. *Kelm v. Carlson*, 473 F.2d 1267, 1269 (6th Cir. 1973). The Court held the statute to violate the Equal Protection Clause under even minimum scrutiny. *Kelm*, 473 F.2d at 1271-72.

waiting period, Tex.Educ.Code § 54.052(e) [now (f)]. The *Weaver* court expressly noted that it was not reviewing the underlying regulations of the Coordinating Board (implemented in the Texas Administrative Code). *Weaver*, 357 F.Supp. at 1111.

In holding the Texas statute constitutional, the Court distinguished the holding of prior cases striking down different statutory schemes.

> In those cases, the offending statutory enactments were found to create *abhorrent conditions in that once a student was classified as a nonresident it was either impossible for him to get reclassified or it was necessary for him to all but forego a whole year's education by enrolling for a low minimum number of semester hours.* Understandably, these statutes were determined to suffer constitutional infirmities; however the Texas statutes are easily distinguishable in that they make allowance for future reclassification of nonresidents after they have overcome the presumptions set out in

the statutes.

Weaver, 357 F.Supp. at 1110-11.[9] The Court in *Weaver* found the Texas statute (one-year waiting period) to be constitutional under the test of minimum scrutiny. However, the regulations of the Coordinating Board, unreviewed by *Weaver*, implement the very policy *Weaver* condemns as *abhorrent*, requiring students "to all but forego a whole year's education by enrolling for a low minimum number of hours."

The *Weaver* opinion cited approvingly of the holdings of *Robertson v. University of New Mexico*, 350 F.Supp. 100 (D. N.M. 1972), which struck down a statute that did not count any time spent in state

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[9]citing [*Vlandis*]; *Robertson v. University of New Mexico*, 350 F.Supp. 100 (D. N.M. 1972); *Covell v. Douglas*, 501 P.2d 1047 (Colo. 1972).

while enrolled in more than six semester hours towards the waiting period, and *Covell v. Douglas*, 501 P.2d 1047 (Colo. 1972), which struck down similar requirements that time spent while enrolled for more that eight hours would not be counted.

IV. This Case Presents for the First Time Statistical Evidence of Deterrent Effect to Travel and the Implication of the Fundamental Right to Travel.

In *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), this Court noted that the fundamental right to travel was deep-rooted in constitutional jurisprudence. In *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), the Court noted three scenarios in which the fundamental right to travel is implicated:

> A state law implicates the right to travel when it actually deters such travel, (citation omitted), when impeding travel is its primary

> objective, (citing *Zobel* and *Shapiro*), or when it uses "'any classification which serves to penalize the exercise of that right.'" (citing *Dunn v. Blumstein*, 405 U.S. 274 (1972) (quoting *Shapiro*)) Our right-to-migrate cases have principally involved the latter, indirect manner of burdening the right.

Soto-Lopez, 476 U.S. at 903. The evidence from this case show that the policies in question fall under the first type, actually deterring travel.

The federal district court in *Starns* rejected the assertion that tuition residence requirements implicate the fundamental right of interstate migration. *Starns*, 326 F.Supp. at 237-38. As this Court summarily affirmed the holding of *Starns* (not the reasoning), lower Courts have not applied strict scrutiny in subsequent tuition residence cases. However, *Starns* involved a statute that

was much more liberal than the policy at issue in this case, a statute which would have allowed Petitioner to be reclassified after his first year. Furthermore, with this Court's questioning in *Zobel* of the logic of *Starns*, and with the expert statistical evidence presented in the trial of this case that these requirements in fact significantly deter a substantial number of students from moving to another state to attend a university, Petitioner asks this Court to specifically examine whether nonresident tuition implicates the right of interstate migration.

In *Starns*, the district court made a specific finding that the one-year waiting period does not have the effect of deterring interstate travel. The district court held:

> Here, by contrast, there are no

> state of facts upon which this Court could posit, as a finding of fact, that the one-year waiting period for resident tuition purposes has as a specific objective excluding or even deterring out-of-state students from attending the University. The record indicates, in fact, that of the approximately 50,000 students enrolled in the University in the fall of 1968, over 6,000 were nonresidents. In view of these statistics, we believe that the one-year waiting period does not deter any appreciable number of persons from moving into the state. There is no basis in the record to conclude, therefore, that the operation of the one-year waiting period had an unconstitutional "chilling effect" on the assertion of the constitutional right to travel.

Starns, 326 F.Supp. at 237-38. The *Starns* plaintiff did not propound any evidence of the deterrent effect of these statutes. However, in this case, two university professors testified at trial on behalf of Petitioner, elaborating on their study that statistically demonstrated that tuition residence requirements do in fact

deter appreciable numbers of persons from moving into the state.

In their study commissioned by the Council of Presidents for the six institutions of public higher education in South Dakota, Professors Ralph J. Brown and Dennis A. Johnson ("Profs. Brown and Johnson") of the University of South Dakota applied principles of econometrics and regression analysis to determine whether fluctuations in the nonresident tuition rate had a demonstrable effect on enrollment from out-of-state. The Counsel was interested in attracting students from out of state, and the study was commissioned to determine the net cost of a unilateral liberalization of tuition policy; i.e, the offset of increased revenues from an increased enrollment (a result of lower nonresident tuition) from

the increased costs of educating more students. Profs. Brown and Johnson used admissions and price data spanning fourteen years, and graphed trends in out-of-state enrollment from six surrounding states, and from all other states and foreign countries. They found a significant correlation between an increase in nonresident tuition and a decrease in out-of-state enrollment.

The most visual demonstration of this correlation was the immediate impact of the 1978 tuition reciprocity agreement between South Dakota and Minnesota. This agreement allowed students of these two states to pay the resident tuition rate at either state's institutions. In the three year period from 1977 and 1980, Minnesota enrollment at one South Dakota public university nearly quadrupled, from 247

students to 953 students. Even more telling, when the agreement was renegotiated in 1982 to charge students the weighted average of the two state's resident tuition rates (thereby raising the relative price of South Dakota tuition, which was lower than that of Minnesota), there was an immediate corresponding drop in enrollment of Minnesota students at South Dakota schools. The correlation between the price of nonresident tuition and enrollment between Minnesota and South Dakota is perhaps graphically illustrated best by Figure 17 of the study. Appendix "K".

The study further demonstrated that the price factor of nonresident tuition is elastic. This means that for a one unit increase of the price of nonresident

tuition, there is greater than a one unit decrease in out-of-state enrollment.

Profs. Brown and Johnson testified that their findings would be applicable to other states, including Texas. As to schools such as the University of Texas and Texas A & M, which have a larger national draw than the South Dakota universities, they testified the impact is even greater. In their opinion, nonresident tuition deters a significant number of students from moving to another state to attend a public university.

Finally, Profs. Brown and Johnson were asked their opinion of the statistics cited in *Starns*. The professors testified unequivocally that the two figures used cited in *Starns* do not statistically demonstrate *anything*. One cannot look at the isolated figures that of 50,000

students enrolled at the University of Minnesota, 6,000 were nonresidents, and statistically determine that "[i]n view of these statistics, we believe that the one-year waiting period does not deter any appreciable number of persons from moving into the state." The problem with looking at just these two isolated figures is that they do not reveal whether there would have been in fact 12,000 nonresidents at the University instead of 6,000 if the policies were different.

As to the opinions and testimony of Profs. Brown and Johnson, the Trial Court found "no evidence at trial that disputed the findings of Professors Brown and Johnson, and finds their conclusions and opinions to be credible." Appendix "C".

The Court of Appeals below did not even mention the statistical evidence

presented by Petitioner as to the deterrent effect on travel. The Court of Appeals instead held the right of travel is not burdened based upon this Court's statement in *Martinez v. Bynum*, 461 U.S. 321, 328, 103 S.Ct. 1838, 1842 (1983) that "any person is free to move to a State and establish residence there." This is true, if the student can afford to pay the nonresident tuition rate for the entirety of his or her college carrier (or "purchase a homestead with a substantial down payment"). As to students without such financial resources, there can be no doubt that the policies not only penalize students who have recently exercised their right of interstate migration, they also deter significant numbers of other students from exercising that right to take up residence in another state.

V. Open the Borders and Increase Competition.

In arguing against the rationality of the refusal to reclassify students deemed to have come to Texas "to go to school", the Respondents' own expert in this case, Prof. Olivas, has testified as follows to the Texas legislature:

> I believe the current law regarding nonresidents (Section 54.054), last revised in 1971, works against the interests of the state of Texas in attracting the brightest students to attend state institutions, and should be amended. The current provision equates "residence" with "domicile" (Section 54.052 a), but then excludes students who move to Texas for college attendance from becoming Texas residents. Of course, the state has a perfect right to do this, and it joins many other states that treat student citizens the same way. *However, I believe that "closing our borders" this way prohibits Texas from recruiting and attracting the greatest talent possible; when combined with the 10-times-Texas tuition provisions, the state has erected a great wall to college student migration,* one that falsely

> assumes non-residents to be a threat to Texas students.
>
> The legislation itself is inconsistent in this regard, for it has erected several "end-runs" around Texas residency requirement and has singled out special groups for reducing or free tuition privileges. Sections 54.051 through 54.210 are chock-full of exemptions and special benefits having nothing to do with duration or domicile.

Testimony of Professor Michael A. Olivas before the Texas Legislature House Committee on Higher Education, March 11, 1985, Institute for Higher Education Law and Governance, University of Houston, Appendix "L" (emphasis added). Prof. Olivas' testimony was not followed, as Texas shortly thereafter *tightened* their policies, making "state residency even more difficult to achieve." M. Olivas, *Administering Intentions*, 59 Jour. of Higher Education at 272.

This Court should open the state

borders for competition among the universities for the "brightest students". The current system is analogous to a tariff restricting competition among universities for these students. Such a holding will not open a "pandora's box" of challenges to all residency requirements. The consideration of residency for university tuition is unique, in that even if a student begins school right after moving from another state, by definition the student now physically resides in the state he or she attends school at least nine months out of the year, as opposed to the case of someone on vacation in the state having to pay a surcharge for a nonresident fishing license. Additionally, with little exception nonresident university students have reached their age of majority, as opposed

to the unemancipated minors (*Martinez v. Bynum*), whose domiciliary intent by definition parallels that of their out-of-state parents. Finally, a holding would not effect a state's right to charge a higher or lower university tuition rate than a neighboring state, as the only reach of the Equal Protection Clause is to questions of whether the state treats its own citizens (whether established or newly arrived) with equal protection.

Should the Court grant review on Question Four, the Court could mandate a pure durational test in determining residency, i.e., a student would automatically qualify after continuous residence in the state for one year (including the summer months), and abandon the nebulous concept of "domicile" in university tuition cases. The pure

durational test is advocated by Prof. Olivas. *Administering Intentions*, 59 Jour. of Higher Education at 283-85. The practice of evaluating a student's domiciliary intent, though widespread, is ineffective.

> Forty states require the establishment of domicile *and* a waiting period, while an additional two states require domicile with no specified durational period. This leaves nine states with pure durational requirements absent intention. Upon closer examination, however, the rationales for the widespread practice of exacting declarations of intention fail to advance any substantial guarantees for establishment of domicile beyond those provided by mere durational requirements, although the cost of administering intentions is high, both in dollar terms and in the considerable ill will it exacts.

M. Olivas, *Administering Intentions*, 59 Jour. of Higher Education at 267. "This system [of evaluating domicile] has become threadbare, in may, respects, and inspires

little confidence either to administrators or to students." *Administering Intentions*, 59 Jour. of Higher Education at 265. "The entire notion of establishing domicile or a single residence is flawed, particularly when it is combined with the requirement that the student also fulfill a waiting period." *Administering Intentions*, 59 Jour. of Higher Education at 283.

Under heightened scrutiny, the Court could uphold the domicile requirement, but strike down the one-year waiting requirement (Question Five), or even hold that there is no compelling (or substantial) state interest for the continuation of the distinction between resident and nonresident university students (Question Six). While the state may have a legitimate interest in

distinguishing between what it considers resident and nonresident students, this interest is small, and is certainly not "compelling" or "substantial". The substantial interest of the students compared to the nominal interest of the state in university resident tuition cases was noted by Justice White in his concurrence in *Vlandis*:

> Here, it is enough for me that the interest involved is that of obtaining a higher education, that the difference between in-state and out-of-state tuition is substantial, and that the State, without sufficient justification, imposes a one-year residency requirement on some students but not on others, and also refuses, no matter what the circumstances, to permit the requirement to be satisfied through bona fide residence while in school. It is plain enough that the State has only the most attenuated interest in terms of administrative convenience in maintaining this bizarre pattern of discrimination among those who must or must not pay a substantial tuition to the University. The discrimination imposed by the State

> is invidious and violates the Equal Protection Clause.

Vlandis, 412 U.S. at 459 (White, J., concurring).

CONCLUSION

In the twenty-two years since the *Vlandis* opinion, states have crafted statutes so exclusive that *Vlandis* has little or no substantive effect. The Texas regulation, although it allows reclassification of a few part-time enrolled, full-time employed students, is so overexclusive as to disqualify the vast majority of students who began school shortly after moving into the state from ever being reclassified as a resident. Under the holding of the Court of Appeals, a state would presumably not even have to allow part-time students to be reclassified, and could provide a

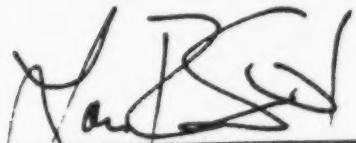
"rebuttable" presumption of nonresidency that could be rebutted only with evidence that the student withdrew from school for an entire year and thereafter re-enrolled. The opinion of the Court of Appeals relegates *Vlandis* to providing only procedural and not substantive guidance, with the result that the only practical distinction a state would have to make from the statute struck down in *Vlandis* would be that a University would have to read the student's application for reclassification.

As noted above, every state distinguishes for University tuition purposes between students they classify as residents and nonresidents, most with a one-year waiting period for reclassification, with forty-one states and the District of Columbia having a

domicile requirement, and nine states having a pure durational requirement. A large portion of the states with domicile requirements augment the waiting period with the overexclusive requirement that time spent in the state for the predominant purpose of attending a university cannot be counted towards the one-year domicile requirement. It can be expected that the majority of states will continue to draft reclassification policies as strict as possible to favor established residents over newly-arrived residents, until substantive guidance is provided by this Court under the Equal Protection Clause.

WHEREFORE, Petitioner, Loren R. Smith, prays that a writ of certiorari be granted.

Respectfully submitted,



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